

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Notice of Transfer of Generating Assets and	:	No. 00-0369
Wholesale Marketing Business and Entry into	:	
Related Agreements pursuant to Section	:	
16-111(g) of the Illinois Public Utilities Act. :		
ILLINOIS COMMERCE COMMISSION	:	
On its own Motion	:	
	:	
V.	:	
	:	
Commonwealth Edison Company	:	No. 00-0394
	:	Consolidated
Proceeding pursuant to Section 16-111(g) of the	:	
Public Utilities Act concerning proposed	:	
transfer of generating assets and wholesale	:	
marketing business and entry into related	:	
agreements.	:	

APPLICATION FOR REHEARING
FILED BY THE ILLINOIS INDUSTRIAL ENERGY CONSUMERS

COME NOW, the Illinois Industrial Energy Consumers (“IIEC”), composed in this proceeding of Abbott Laboratories, Inc; A. Finkl & Sons Co., Inc; Caterpillar Inc; Daimler Chrysler Corporation; Ford Motor Company; Modern Drop Forge Company; Monsanto Company; Motorola, Inc; Nabisco Brands, Inc; Northwestern Steel & Wire Company; Viskase Corporation; Owens-Illinois, Inc; and Acme Steel Company, and pursuant to 220 ILCS 5/10-113 and 83Ill.Adm.Code 200.800, and herewith apply for a rehearing of the Commission’s Order entered on the 17th day of August, 2000 in Commonwealth Edison Company (“ComEd”) Consolidated Dockets 00-0369 and 00-0394 (“Order”), and in support of such application for rehearing, state as follows:

I.

ISSUES ON WHICH REHEARING IS SOUGHT

IIEC seeks rehearing on the following issues in regard to which the Commission erred or misapprehended in the conclusions and determinations set forth in its Order.

A. The Commission erred or misapprehended in determining and concluding that decommissioning trust funds are assets of ComEd.

(Order, Part IV D - Commissioners' Conclusion, P. 22, and Part VI - Findings and Ordering Paragraphs Finding (2) that the Commission has jurisdiction over the subject matter in this docket and Finding (4) that ComEd's May 22, 2000 notice of the transfer of its nuclear generating station assets is in compliance with the requirements of Section 16-111(g) of the Act, and Finding (8) that the transfer of decommissioning trust assets is approved, , P. 26, and in its Ordering Paragraph at Order Page 27 that the transfer of ComEd's generation station assets, nuclear decommissioning trusts and wholesale marketing assets as described in ComEd's May 22, 2000 notice, is approved.

B. The Commission erred or misapprehended in determining and concluding that the transfer of the nuclear decommissioning trust funds should be approved in a Section 16-111(g) proceeding.

(Order, Part IV D - Commission's Conclusion, P. 22, and Part VI - Findings and Ordering Paragraphs, Finding (2) that the Commission has jurisdiction over the subject matter of this docket and Finding (4),

that the notice of transfer of the nuclear generating station's assets is in compliance with the requirements of Section 16-111(g) of the Act and Finding 8 that the transfer of ComEd's nuclear generating station assets, nuclear decommissioning trusts and wholesale marketing assets as described in the Company's May 22, 2000 notice should be approved., P. 26, and in its Ordering paragraph, Order Page 27 that the transfer of ComEd's generation station assets, nuclear decommissioning trusts, and wholesale marketing assets as described in ComEd's May 22, 2000 notice, is approved).

C. The Commission erred or misapprehended when it failed to determine and conclude that the proposed transfer of assets violates the provisions of Section 8-508.1 and the decommissioning trust agreements approved thereunder.

Order, Part IV C - Commission's Conclusions, P. 22, and Part VI - Findings and Ordering Paragraphs, Finding (4) that ComEd's May 22, 2000 notice of the transfer of its nuclear generating station asset is in compliance with the requirements of Section 16-111(g) of the Act, and Finding (8) that the transfer of ComEd's nuclear generating station assets, nuclear decommissioning trusts and wholesale marketing assets, as described in ComEd's May 22, 2000 notice should be approved, and Finding (9) that the Commission's approval of the proposed transaction does not limit the Commission's jurisdiction over ComEd's assessment of decommissioning charges to

ratepayers or the operation of the Company's decommissioning cost rider under the Public Utilities Act.

D. The Commission erred or misapprehended in determining and concluding that the transfer will not render ComEd unable to provide its tariffed services in a safe and reliable manner.

(Order, Part III C 5 - Commission's Conclusion, Pp. 13-14 and Part V E - Commission's Conclusions, P. 25 and Part VI -Findings and Ordering Paragraphs, Finding (4) that ComEd's May 22, 2000 notice of the transfer of its nuclear generating station assets is in compliance with the requirements of Section 16-111(g) of the Act and Finding (5), that the Commission will not render Commonwealth Edison unable to provide its tariff services in a safe and reliable manner and in the ordering paragraph at Order Page 27 that the transfer of ComEd's generation station assets nuclear decommissioning trust and wholesale marketing assets as described in ComEd's May 22, 2000 notice is approved.)

E. The Illinois Commerce Commission erred or misapprehended in determining and concluding that the ROE analysis presented by ComEd and Staff established that there is not a strong likelihood that consummation of the transfer will result in ComEd being entitled to request an increase in its base rates during the mandatory transition period pursuant to Section 16-111(d) of the Act.

(Order, Part III D 4 - Commission's Conclusion, P. 17, and Part VI - Findings and Ordering Paragraphs, Finding (4) that ComEd's May 22, 2000 notice of the transfer of its nuclear generating station assets is in

compliance with the requirements of Section 16-111(g) of the Act, and Finding (8) that the transfer of the Company's nuclear generating station assets, nuclear decommissioning trust and wholesale marketing assets as described is described in ComEd's May 22, 2000 notice, should be approved, and Finding 6 - that there is not a strong likelihood that consummation of the proposed transaction will result in Commonwealth Edison Company being entitled to request an increase in its base rates during the mandatory transition period pursuant to Section 16-111(d) of the Act, and Finding (8) that the transfer of the Company's nuclear generating station assets, nuclear decommissioning trust and wholesale marketing assets as described is described in ComEd's May 22, 2000 notice, should be approved, and in the ordering paragraph at Page 27 that the transfer of ComEd's generation station assets, nuclear decommissioning trust and wholesale marketing assets as described in ComEd's May 22, 2000 notice is approved. Order, P. 27).

Therefore, in regard to the issues identified and matters determined as herein specified, IIEC herewith makes application for rehearing relative to same and hereafter states reasons why said rehearing on said issues should be granted.

II.

REASONING IN SUPPORT OF REQUEST FOR REHEARING

A. The Illinois Commerce Commission (“Commission”) erred or misapprehended in determining and concluding that decommissioning trust funds are assets of ComEd

Section 16-111(g) of the Public Utilities Act (220 ILCS 5/16-111(g)(3)) (“Act”) provides that during the mandatory transition period an electric utility may “...sell, assign, lease or otherwise transfer assets to an affiliated or unaffiliated entity...” (emphasis supplied). Given such statutory language, the Commission should first determine whether the “assets” proposed to be transferred are really assets of ComEd.

IIEC, in its Initial Brief at pages 4 through 7, Part II - Transfer of the Trust Funds - pointed out that the nuclear decommissioning trust funds and the assets in those funds are not assets of the electric utility within the meaning of Section 16-111(g) and gave as reasons therefor that:

1. Said trust funds were created as the result of an enactment of the Illinois General Assembly (220 ILCS 5/8-508.1) wherein it was indicated that the assets of the trusts were to be separated from the assets of the electric utility. (220 ILCS 5/8-508.1(3)). Pursuant to that legislative act, two nuclear decommissioning trusts were created for each nuclear generating unit owned by the utility and an independent trustee was appointed to manage same. Section 8-508.1 also provided that, to the extent assets in the trust fund exceeded the cost of decommissioning, the excess was to be refunded to the customers. (IIEC Initial Brief, Pp. 4-5). (The Trust Agreements themselves and the provisions set forth therein support the conclusion that these assets are not assets of ComEd. (IIEC Brief on Exceptions, Pp. 10-18)).

2. IIEC argued that the subject Decommissioning Trusts had all the characteristics or essential elements of a valid trust, and being a valid trust,

demonstrate the trust assets are not assets of ComEd. IIEC also pointed out that one of the essential elements of a valid trust is the “definite, present and complete disposition” of the trust property by the creator of the trust, (in this instance, ComEd) citing 76 AmJur 2d 80 - Trusts, Sec. 51. (IIEC Initial Brief, P. 6).

3. IIEC also argued that the ComEd contributions to the tax qualified decommissioning trust fund was allowed to be deducted from the utility’s federal income tax by the Internal Revenue Code (Sec. 468(a)). If ComEd held legal title to the trust funds and the assets in the trust funds, such contribution could not be considered to have been tax deductible. (IIEC Initial Brief, Pp. 6-7).

IIEC has pointed out that the word “assets” is defined in Black’s Law Dictionary, Rev. Fourth Edition, as “The aggregate and available property, stock in trade, cash, etc., belonging to a merchant or mercantile company”. Therefore, IIEC reasoned that the ordinary and popularly understood meaning of the word “assets” includes the concept that the asset must be “owned by” or be the “property of” the corporation. IIEC further points out that the word “assets” as used throughout the Public Utilities Act refers to “assets of the public utility” and therefore, has the same meaning when used in the context of Section 16-111(g). (IIEC Brief on Exceptions, Pp. 9-10).

The analysis of the Commission Staff (“Staff”) and ComEd each overlooked the fact that Section 16-111(g) was intended to permit a public utility to transfer only assets which it owns without the prior approval of the Commission. Because the nuclear decommissioning trust funds and the assets in the trust funds are not “assets of the public utility” they are not eligible for transfer under Section 16-111(g). (IIEC Reply Brief, P. 5).

B. The Commission erred or misapprehended in determining and concluding that the transfer of the nuclear decommissioning trust funds should be approved in a Section 16-111(g) proceeding.

Nuclear decommissioning trust funds which are not an asset of the utility are not contemplated to be a transferable asset under Section 16-111(g). Such transfer would constitute a violation of Section 8-508.1 of the Public Utilities Act (“PUA”) which specifically requires the creation of nuclear decommissioning trust funds to ensure that funds are available to decommission nuclear units at the end of their useful lives. (IIEC Brief on Exceptions, P. 16). The provisions of Section 8-508.1 of the Act calls for the refund to ratepayers of assets in a nuclear decommissioning trust that exceed the amount necessary to pay the decommissioning costs of the nuclear power plant for which the fund was established. The transfer of the trust fund, if permitted and implemented under a Section 16-111(g) transfer, would violate Section 8-508.1 in that it would prevent any determination by the Commission of the need for refunds and the making of same as provided for in that Section. (IIEC Initial Brief, Pp. 7-8; IIEC Brief on Exceptions, Pp. 10-14). Such an act in approving the transfer would constitute a surrendering of the authority the Commission has and an abandonment of the duty to exercise same under the provisions of Section 8-508.1. The transfer of decommissioning trust funds, as an asset of ComEd, to an unregulated affiliate would deprive ratepayers of the benefits to which they are entitled under the provisions of Section 8-508.1 and the Commission could lose jurisdiction over the administration of any refunds to which the ratepayers may be entitled by the loss of the jurisdiction over the trust funds themselves. (IIEC Brief on Exceptions, Pp. 15, 17).

If Section 16-111(g) limits the Commission’s deliberations in this case to two issues, namely, as ComEd alleges, the determination of the ability of ComEd to provide safe and reliable tariffed service after the transfer of assets and the determination of whether or not there is any likelihood that

ComEd would be able to seek a rate increase as a result of the transactions, then the Commission has no jurisdiction to litigate compliance with Section 8-508.1 in a Section 16-111(g) proceeding. (IIEC Reply Brief, Pp. 6-7). It also should be noted that Section 16-111(g) prohibits the Commission from reviewing any transaction authorized under that Section in any subsequent proceeding (220 ILCS 5/16-111(g)(vi)). Thus, the Commission may be barred in the future from determining whether or not any refunds may be due, or from the ordering of such refunds if decommissioning trust funds are transferred as an asset under a Section 16-111(g) transaction. (IIEC Initial Brief, Pp. 7-8).

That it was not the intention of the General Assembly to authorize the consideration of a transfer of decommissioning trusts and the funds related thereto under a Section 16-111(g) proceeding is a fact evidenced by the General Assembly's action in 1999 in the adoption of Section 16-114.1 for addition to the Public Utilities Act of Illinois. The provisions of Section 16-114.1 specifically granted an electric utility owning a single nuclear generating plant located within the State of Illinois the right to transfer its nuclear decommissioning trusts, or the balance in the trusts, to the buyer of its nuclear power plant. If the Legislature had intended originally to allow the transfer of decommissioning trust assets by a Section 16-111(g) proceeding, there would have been no purpose in the adoption of Section 16-114.1 some two calendar years after the adoption of Section 16-111(g). (IIEC Initial Brief, Pp. 3-4).

There is a question as to whether or not the notice presented by ComEd for activation under Section 16-111(g) is a proper notice, having included an asset for transfer which is not actually an asset of the utility, namely, the decommissioning trust funds. The trust fund assets should be removed from the list of assets noticed to be transferred and a separate proceeding initiated to address the issue. (IIEC Reply Brief, Pp. 5-6).

C. The Commission erred or misapprehended when it failed to determine and conclude that the proposed transfer of assets violates the provisions of Section 8-508.1 and the decommissioning trust agreements approved thereunder.

The nuclear decommissioning trusts and the administration of same were prescribed by Section 8-508.1 of the Act and the Commission has not given adequate consideration to the controlling effect of the provisions of that Section 8-508.1 of the Act in matters related to the decommissioning trusts. (IIEC Initial Brief, Pp. 4-5; IIEC Brief on Exceptions, P. 11).

IIEC has maintained throughout the process in this docket that the decommissioning trust funds are not “assets” of ComEd and that such were improperly included in ComEd’s notice of transfer as an asset which the utility intended to transfer. The transfer of the decommissioning trusts and funds related thereto cannot be made the subject of a Section 16-111(g) transfer proceeding. The argument as to the status of the decommissioning trust funds not being an asset of ComEd has been set forth under the issue A portion of this Application for Rehearing.

The trust agreements created under the provisions of Section 8-508.1, state that ComEd has delivered the funds and assets in question to a trustee for the uses and purposes and upon the terms and conditions specified therein. (IIEC Brief on Exceptions, Pp. 10-18). In mandating the trusts, the General Assembly specifically provided that distributions could be made from the trusts only to satisfy the liabilities of the public utility for nuclear decommissioning costs and that to the extent assets in the nuclear decommissioning trust exceeded the amount necessary to pay nuclear decommissioning costs. The excess assets were to be refunded to the utility for the purpose of refunds or credits to ComEd’s customers. The General Assembly further provided for refunds to the extent ComEd sold or otherwise dispose of its direct ownership interest in its nuclear units.

Section 8-508.1 specifically provides that: the trustee was to invest the assets of the trust, that the income earned by the trust funds was to become part of the trust, that the Commission had the power to adopt, by rule or regulation, further restrictions for the sound management of the trust funds; and that the trustee was to make annual reports to the Commission (Section 5/8-508.1(b)(c); (c)(3)(i), (ii), (iii), (iv), (v), (viii), and (e)). (IIEC Brief on Exceptions, Pp. 11-16).

IIEC takes issue with the provision of Finding (9) in the Findings and Ordering Paragraphs of the Order to the extent it that it finds that the approval of the transaction does not limit the Commission's jurisdiction over ComEd's assessment of the decommissioning charges or the operation of the Company's decommissioning cost rider. However, it agrees with the finding that the approval of the transfer of the nuclear decommissioning trust does not relieve ComEd from any refund responsibilities under Section 8-508.1(c)(3) of the Act at this time, but after the agreements which are made part of the transfer requests, are executed and placed in force, the Commission loses jurisdiction over the decommissioning trust funds and ComEd could lose use of the trust funds as a source for the refund of revenues and be forced to find internal sources to satisfy the refunds.

Overall, said Finding (9) evidences a failure of the Commission to recognize that the provisions in Section 8-508.1(c)(3)(iii) as they apply to refunds. The Commission's order of August 17, 2000 approved the transfer of the trust funds, but deferred the question of refunds provided under Section 8-508.1. The authority of the Commission to protect customer refunds that might come from any determined surplus of the trust funds could be blocked by the Commission's own order to the extent that the Commission loses jurisdiction over the decommissioning trust funds. (IIEC Brief on Exceptions, P. 17).

If the Commission approves the transfer of assets requested by ComEd, which request includes the decommissioning trust and trust funds, the result could be that neither the State of Illinois, nor the Illinois Commerce Commission will have any authority to oversee the use and administration of the assets in the funds to assure that they will be available for nuclear decommissioning or that any excess funds are refunded to Illinois customers. At the same time, the Commission could be faced with the argument that ComEd should be allowed to continue to collect nuclear decommissioning charges from its customers. (IIEC Brief on Exceptions, Pp. 16-20).

D. The Commission erred or misapprehended in determining and concluding that the transfer will not render ComEd unable to provide its tariffed services in a safe and reliable manner.

While Staff testimony recited that ComEd had the ability to provide safe and reliable tariff service through 2004, that conclusion as same related to service beyond the year 2004 appeared to be based upon speculation. That Staff's conclusion was based on two assumptions. First, there would be the development of an open and competitive generation market and second, if such a market does not develop, that re-regulation would occur. (Tr. 131). The existence of a competitive generation market by the year 2004 is unknown and unknowable at this time. The Staff witness relied on what he described as new generation planned and under construction at this time in the ComEd control area (referencing Attachment 1 to his prepared testimony.) On cross-examination it was established that, of the 16,763 megawatts of capacity identified in the exhibit, 10,400 megawatts were not permitted or under construction and did not have construction permits; of the 1,146 megawatts of capacity construction completed in 1999 only 950 megawatts were located in the ComEd service territory. Staff witness estimated that there is only something roughly in excess of 2,200 megawatts under construction in the ComEd service territory. (IIEC Initial Brief, Pp. 8-9).

Because the statute deprives the Commission of jurisdiction over construction of generating assets by a public utility, (220 ILCS 5/8-503), re-regulation is not an option if the market does not develop. Therefore, there is no substantial demonstration in the record on which the Commission can rely to conclude that there is no likelihood that the transactions in question will result in the inability to provide safe and reliable tariff service after 2004. (IIEC Initial Brief, Pp. 8-9; IIEC Brief on Exceptions, Pp. 3-6).

While the Order relies upon the guarantee of ComEd's PPA with Exelon Genco as guaranteeing a significant source of supply in the years 2005 and 2006, Exelon Genco will not be subject to regulation by the Commission and, therefore, the Commission will not be able to require Exelon Genco to make the capacity available or to control any decisions of Exelon Genco in relation to determinations in that regard. Likewise, the Commission relies on ComEd voluntarily building new needed capacity if new additions do not materialize. That commitment is purely voluntary and cannot, under Illinois law, be enforced by the Commission. (IIEC Brief on Exceptions, Pp. 4-6).

E. The Illinois Commerce Commission erred or misapprehended in determining and concluding that the ROE analysis presented by ComEd and Staff established that there is not a strong likelihood that consummation of the transfer will result in ComEd being entitled to request an increase in its base rates during the mandatory transition period pursuant to Section 16-111(d) of the Act.

The Commission relies on the ROE analysis submitted by ComEd and Staff that consummation of the transfer will not result in ComEd being entitled to request an increase in its base rates during the mandatory transition period. The Staff and the Company analysis of ROE is incomplete because neither Staff nor the Company considered the possibility that there would be any refunds associated with the decommissioning issue. Therefore, the impact of such refunds on the

Company's ROE has not been determined. To the extent the Company's ROE would be adversely affected, it would be able to seek an increase in base rates during the mandatory transition period pursuant to Section 16-111(d) of the Act. Whether or not the Commission would grant such rate relief is totally irrelevant to the analysis.

If Edison had to make a refund, it would do so under a situation where it no longer had the right to seek access to the trust fund to cover such refunds, it would have to pay any refunds out of current earnings. To the extent current earnings are reduced because of the necessity for such refunds, the Company's return on common equity would decline, thereby creating the possibility that the transfer of the trust funds will make it likely ComEd will be able to apply for a base rate increase under Section 16-111(d). (IIEC Brief on Exceptions, Pp. 7-9).

III.

CONCLUSION

The law and the facts applicable in this case support IIEC's contention that:

1. The decommissioning trusts and the funds related thereto are not assets of ComEd, subject to consideration for transfer under Section 16-111(g) of the Act but are assets dedicated under Section 8-508.1 of the Act to the funding necessary for the decommissioning of nuclear units now owned by ComEd and the notice of intention to transfer as filed by ComEd improperly included, as an asset to be transferred, investments held in ComEd's decommissioning trusts.

2. Section 16-111(g) does not authorize consideration of the transfer of decommissioning trusts and funds related thereto under the procedure established by its provisions.

3. The adoption of Section 16-114.1 of the Public Utilities Act, by the Illinois legislature in 1999, is the only statutory provision which grants an electric utility the right to transfer its nuclear

decommissioning trusts under Section 16-111(g) and that grant was made applicable only to an electric utility owning a single unit nuclear generating plant. It is not applicable to ComEd.

4. The transfer of the nuclear decommissioning trust fund assets violates Section 8-508.1 and the trust agreements approved thereunder.

5. The authorization of the transfer of the trust funds surrenders or abrogates the Commission's authority and jurisdiction over said trusts and the assets under their supervision and the assets held thereunder and violates the mandates imposed upon the Commission by the Illinois General Assembly in its adoption and application of Section 8-508.1 of the Act.

6. The evidence in the record in this docket fails to support a conclusion that the transfer requested will not render ComEd unable to provide its tariffed services in a safe and reliable manner.

7. The evidence in the record in this docket fails to support the conclusion that there is not a strong likelihood that consummation of the transfer will result in ComEd being entitled to request an increase in its base rates during the mandatory transition period.

WHEREFORE, the IIEC applicants respectfully request that the Commission grant and undertake a rehearing in respect to the matters identified herein as determined in the Commission's order of August 17, 2000, and as specified in this Application for Rehearing.

Respectfully submitted,

Eric Robertson
Randall Robertson
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ONE OF THE ATTORNEYS FOR THE IIEC GROUP

27823.1

PROOF OF SERVICE

STATE OF ILLINOIS)
)
COUNTY OF MADISON) SS

I, Randall Robertson, being an attorney admitted to practice in the State of Illinois and one of the attorneys for Illinois Industrial Energy Consumers herewith certify that I did on the 28th day of August, 2000, electronically file with the Illinois Commerce Commission an Application for Rehearing filed on behalf of the Illinois Industrial Energy Consumers, and serve same upon the persons identified on the attached service list, by depositing same in the United States Mail, in Granite City, Illinois with postage fully prepaid thereon.

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SUBSCRIBED AND SWORN to me, a Notary Public, on this 28th day of August, 2000.

Notary Public

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION	:	
On its own Motion	:	
	:	
V.	:	
	:	
Commonwealth Edison Company	:	No. 00-0394
	:	
Proceeding pursuant to Section 16-111(g) of the	:	
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transfer of generating assets and wholesale	:	
marketing business and entry into related	:	
agreements.	:	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on this 28th day of August, 2000, we have electronically filed with the Illinois Commerce Commission, 527 East Capitol Ave., Springfield, Illinois, 62794, an Application for Rehearing, on behalf of the Illinois Industrial Energy Consumers, along with Proof of Service thereon attached.

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